ATTACHMENT 8

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	99-0593
Illinois Bell Telephone Company	:	
	:	
Investigation of construction charges	:	

ORDER

DATED: August 15, 2000

TABLE OF CONTENTS

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	**99-0593**
Illinois Bell Telephone Company	:	
	:	
Investigation of construction charges	:	

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On November 3, 1999, the Illinois Commerce Commission ("Commission"), on its own motion, initiated an investigation into Illinois Bell Telephone Company's ("Ameritech") application of its tariff governing special construction charges, pursuant to Section 9-250 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq. The Commission opened the investigation in light of pleadings submitted in Docket No. 99-0525, which concerned a complaint filed on October 4, 1999 under Sections 13-514 and 13-515 of the Act against Ameritech by McLeodUSA Telecommunications Services, Inc. ("McLeod") and Ovation Communications, Inc. d/b/a McLeodUSA ("Ovation"). The allegations contained in the complaint in Docket No. 99-0525 and Ameritech's response raised the question of whether Ameritech is applying special construction charges in a discriminatory or preferential manner with regard to its retail customers and competitive local exchange carriers ("CLEC") purchasing unbundled network elements ("UNE").

Pursuant to due notice, status hearings were held in this matter before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois on November 24, 1999, January 6, and January 25, 2000. Active parties submitted prepared direct testimony on February 17, rebuttal testimony on March 8, and surrebuttal testimony on March 22, 2000. Evidentiary hearings were held on April 3 and 4, 2000. The following entities filed petitions to intervene: MCI WorldCom, Inc. ("MCI WorldCom"), AT&T Communications of Illinois, Inc., McLeod, NextLink Illinois, Inc. ("NextLink"), Sprint Communications Company d/b/a Sprint Communications L.P., Allegiance Telecom of Illinois, Inc. ("Allegiance"), CoreComm Illinois, Inc., US Xchange of Illinois, L.L.C., Rhythms Links Inc. ("Rhythms"), Ovation, Covad Communications Company ("Covad"), NorthPoint Communications ("NorthPoint"), MGC Communications Inc., d.b.a Mpower Communications Inc., @Link Networks, Inc., d/b/a Dakota Services Ltd., Vectris Telecom, Inc., DSLnet Communications, LLC, and the Attorney General on

behalf of the People of the State of Illinois. All of the petitions to intervene were granted. Commission Staff ("Staff") also participated in this proceeding.

Several parties offered testimony at the evidentiary hearing: Michael Suthers and Richard Florence testified on behalf of Ameritech; Christopher Graves and Patrick Phipps offered testimony on behalf of Staff; Michael Starkey testified on behalf of McLeod, Ovation, MCI WorldCom, and Allegiance; Scott Jennings testified on behalf of McLeod and Ovation; Valerie Evans offered testimony on behalf of Covad; Terry Murray and Joseph Riolo testified on behalf of Covad and Rhythms; and Ann Lopez offered testimony on behalf of Rhythms.

The record was marked "Heard and Taken" at the end of the April 4 hearing. Ameritech and Staff each filed an Initial Brief and Reply Brief. McLeod, Ovation, MCI WorldCom, and Allegiance also filed a joint Initial Brief and Reply Brief. Covad and Rhythms filed a joint Initial Brief and Reply Brief as well. The Hearing Examiner's Proposed Order was served on the parties. Ameritech filed a Brief on Exceptions. Covad and Rythms filed a joint Brief on Exceptions. Ameritech and Staff each filed a Brief in Reply to Exceptions. McLeod, Ovation, MCI WorldCom, and Allegience filed a joint Brief in Reply to Exceptions. Covad and Rhythms filed a joint Brief in Reply to Exceptions as well. The Briefs on Exceptions and Briefs in Reply to Exceptions have been considered in the preparation of this Order.

II. BACKGROUND

Section 251(c)(3) of the federal Telecommunication Act of 1996 ("TA96"), 47 U.S.C. 151 et seq., requires incumbent local exchange carriers ("ILEC"), such as Ameritech, to provide to any requesting CLEC, for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Federal Communications Commission ("FCC") has identified a minimum set of network elements that must be provided on an unbundled basis. The list of such elements, or UNEs, includes: local loops, local and tandem switches, interoffice transmission facilities, network interface devices ("NID"), signaling and call related database facilities, operations support systems functions, and operator and directory assistance facilities. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, FCC 96-325 (August 1, 1997), ¶27. ("First Report and Order") Paragraph 27 of the First Report and Order also indicates that states may require ILECs to provide additional UNEs. Subsequent to the First Report and Order, the FCC added dark fiber, loop conditioning, and subloops to the list of UNEs. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, FCC 99-238 (November 5, 1999), ¶¶167, 173, and 205. ("UNE Remand Order")

Purchasing UNEs from ILECs is one means by which CLECs can compete with ILECs. Another means of competition is resale by CLECs of services purchased from ILECs. Many CLECs prefer purchasing UNEs over reselling services because they can make more use out of, and hence make more money from, a purchased UNE. An unbundled loop may be used to demonstrate this idea. An unbundled loop consists of three basic components. The first component is feeder cable, which is connected at one end to either the main distribution frame ("MDF") or the digital switch, depending on the type of technology in place, in a central office and at the other end to the serving area interface ("SAI"). The SAI is the cross-connect point, often a cross-connect box, between the first component, the feeder portion, and second component, the distribution portion, of the unbundled loop. Distribution cable typically runs from a SAI to a pedestal or distribution terminal near the end user's premises. From the pedestal, the third basic component, drop cable, extends to the NID outside of the end user's premises. The NID marks the end of the unbundled loop and the beginning of the end user's inside wiring. A CLEC purchasing an unbundled loop from an ILEC can decide for itself what types of services it will offer and deliver over that loop. On the other hand, a CLEC reselling a service purchased from an ILEC is limited to reselling only the purchased service.

At the heart of this matter are charges assessed by Ameritech on CLECs when they request particular UNEs and Ameritech determines that the requested UNEs can not be made available without additional construction activities. Such charges are known as special construction charges. Staff and those CLECs that are active in this proceeding contend that Ameritech, to at least some extent, is (1) already recovering its costs associated with making UNEs available through the recurring rates it charges for UNEs and (2) assessing special construction charges on CLECs but not retail customers in similar circumstances, resulting in end user customers being deterred from taking service from a CLEC. Ameritech maintains that its special construction policies are lawful and reasonable.

III. AMERITECH'S SPECIAL CONSTRUCTION TARIFF AND POLICIES

To evaluate the propriety of Ameritech's special construction charges and the manner in which they are assessed on retail customers and CLECs, it necessary to understand Ameritech's special construction tariff and policies. Since this docket was initiated, Ameritech's special construction charge policy concerning CLECs has changed considerably. The following discussion describes Ameritech's tariff and policies as they relate to Ameritech's retail customers and CLECs, and identifies the changes to Ameritech's policy regarding CLECs as well.

A. Special Construction and Retail Customers

Ameritech asserts that special construction charges for its retail customers are governed by Ill. C. C. No. 20, Part 2, Section 5, Original Sheets Nos. 1 through 6 of its tariff. Ameritech refers to this tariff as its "retail special construction tariff." These

sheets became effective on December 8, 1995 and apply to the provision of noncompetitive telecommunication services. Paragraph 1 on Original Sheet No. 1 states:

> All rates and charges quoted elsewhere in this tariff provide for the furnishing of service when (1) suitable facilities are available, and (2) the revenue to be derived from the service is sufficient to warrant [Ameritech] assuming the usual cost of providing the necessary facilities. If these conditions are not met, the provisions of this section apply in addition to those quoted elsewhere in this tariff.
>
> Special construction charges are applicable for work performed, at the request of the customer, on the central office side of the NETPOP, the location of which is described in Section 2 of this Part.

Paragraph 2 beginning on Original Sheet No. 1 then proceeds to list nine conditions under which special construction charges are applicable. The list reads as follows:

2 SCOPE

2.1 Special Construction Charges as specified are applicable for each of the following conditions:

A. When, at the request of the customer, the Company constructs facilities to provide service where there is no other requirement for the facilities so constructed, the customer shall pay the cost of such construction except as outlined in 5.1 following.

B. When, at the request of the customer, the Company constructs facilities of a type other than that which the Company would otherwise construct in order to provide service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

C. When, at the request of the customer, construction by the Company involves a routing for facilities other than that which the Company would normally use in order to provide service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

D. When, at the request of the customer, the Company constructs temporary facilities to provide service for a period during which permanent facilities are under construction, the

customer shall pay the cost of constructing the temporary facilities.

E. When, at the request of the customer, the Company constructs a greater quantity of facilities than that which the Company would otherwise construct in order to fulfill the customer's initial requirements for service, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

F. When, at the request of the customer, the Company expedites construction of facilities at a greater expense than would otherwise be incurred, the customer shall pay the excess construction cost over that which the Company would have ordinarily incurred.

G. When, at the request of the customer, a rearrangement, move or replacement of existing facilities is made, the Customer shall pay the charges outlined in 5.3 following.

H. When, at the request of the customer, a service is required where the revenue to be derived is not sufficient to warrant the Company assuming the unusual cost of providing the necessary service, the customer may be required to pay all or a portion of such cost.

I. When, at the request of the customer, service is required at locations that may present hazards to personnel or communications equipment, the customer shall pay the full cost of providing any protection equipment required to minimize such hazard.

Ameritech's "retail special construction tariff" does not define the term "available," nor does it contain any language restricting applicability to retail customers.

B. Special Construction and CLECs

1. Ameritech's tariff provisions

a. Ameritech's "UNE special construction tariff"

Ill. C. C. No. 20, Part 19, which is the part of Ameritech's tariff that addresses UNEs, references special construction charges in the context of providing UNEs. Specifically, Section 1, Original Sheet No. 4.4 contains language stating:

> [Ameritech] shall be required to make available Network Elements only where such Network Elements, including facilities and software necessary to provide such Network Elements, are available. If [Ameritech] makes available Network Elements that require special construction, the [CLEC] shall pay to [Ameritech] any applicable special construction charges.

This language, according to Ameritech, preempts its aforementioned "retail special construction tariff." Ameritech relies on the following sentence from Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 1 as the basis for this assertion: "General Regulations as found in Part 2 of this tariff apply to this Part unless otherwise specified in this Part." This "UNE special construction tariff" does not define the term "available."

b. Unbundled loops in the presence of IDLCs and RSUs

Also found on Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 4.4 is tariff language regarding the provisioning of unbundled loops in areas served by integrated digital loop carriers ("IDLC") and remote switching units ("RSU"). The relevant portion of Ameritech's tariff reads as:

> [Ameritech] shall provide the [CLEC] access to its unbundled Loops at each of [Ameritech's] Wire Centers. In addition, if the [CLEC] requests one or more Loops serviced by Integrated Digital Loop Carrier or Remote Switching technology deployed as a Loop concentrator, [sic] shall, where available, move the requested Loop(s) to a spare, existing physical Loop at no charge to the [CLEC]. If, however, no spare physical Loop is available, [Ameritech] shall within forty-eight (48) hours of the [CLEC's] request notify the [CLEC] of the lack of available facilities. The [CLEC] may then at its discretion make a Bona Fide Request for [Ameritech] to provide the unbundled Loop through the demultiplexing of the integrated digitized Loop(s). Notwithstanding anything to the contrary in this tariff, the provisioning intervals set forth under Network Element Performance Benchmarks shall not apply to unbundled Loops provided under this paragraph.

The provisioning of unbundled loops in the presence of IDLCs and RSUs is a significant issue in this docket, which will become apparent below where IDLCs and RSUs are discussed in the context of Ameritech's special construction policies. The technical aspects of IDLCs and RSUs will also be discussed below. From the testimony, however, it appears that Ameritech may not have always adhered to the quoted tariff language to the benefit of CLECs. Ameritech also indicates that substantially similar language appears in each of its interconnection agreements with CLECs.

2. Ameritech's Policy as of November 3, 1999

When this docket was initiated, the availability of unbundled loops was a significant concern. At that time, Ameritech considered a loop to be "available" only if the entire transmission path from the customer to the wire center was in place at the time of the order. If an unbundled loop was not "available" to fill a CLEC's order, according to Covad witness Evans, Ameritech would assess special construction charges if it determined that one or more of seven types of activity needed to be performed to make that UNE available: (1) disaggregating IDLCs or RSUs, which required a Bona Fide Request ("BFR") to provide an unbundled loop, (2) purchasing and installing plug-in equipment, (3) "break connect through," (4) repairing a defective pair, (5) unloading a pair, (6) placing and splicing cable, or (7) other types of work that do not fit in one of the other categories. The source of Ms. Evans list is an e-mail dated November 8, 1999 from Ameritech responding to Covad's request for a list of special construction categories. That e-mail has been marked as VRE 1.2 and attached to Covad Ex. 1.0. If making an unbundled loop available required the transfer of existing "connected through" loops from Ameritech to a CLEC or a simple dispatch to connect existing loops that were contiguous but unconnected, Ameritech did not assess special construction charges.[1] Ameritech required the payment of any special construction charges in toto before any construction would begin.[2]

In those situations where a BFR was required by Ameritech, Ms. Evans testifies that Ameritech's written policies require Covad to submit a BFR form to Ameritech along with a nonrefundable $2,000 deposit to cover Ameritech's development of a price quote for the facilities. Ameritech witness Suthers adds that as an option to paying the $2,000 deposit, CLECs may submit a BFR without any deposit and agree to pay whatever costs Ameritech incurs to prepare the preliminary analysis. Regardless of the option selected, within 30 days of its receipt of a complete BFR form, Ameritech provides Covad with a preliminary assessment of the request, which includes: (1) whether Ameritech is required to fulfill the request under applicable regulatory requirements; (2) whether the request is technically feasible; and (3) whether the request is currently available from Ameritech in the form of another product or service offering. Thus, Ms. Evans reports that submission of a BFR does not guarantee that Ameritech will even provide the UNE. In the event that Ameritech intends to provide the UNE, Ms. Evans indicates that Ameritech then may take an additional 90 calendar days to develop a price quote for the requested product or service. In the end, she states that, under the BFR process, it may take approximately four months to even receive a price quote from Ameritech for the desired product or service. Additional time will be necessary to actually provide the requested UNE. If after five days from

[1] Descriptions of some of the referenced technical activities will be provided below.

[2] Since the focus of this proceeding has been Ameritech's present special construction policy, the record is sketchy regarding Ameritech's special construction policy as it existed when this docket was initiated. In any event, however, the discussion of the policy as of November 3, 1999 is merely provided to demonstrate on a basic level how Ameritech's special construction policy has changed since this investigation began.

providing a quote for special construction work the CLEC does not agree to pay the special construction charges, Mr. Suthers testifies that Ameritech will cancel the loop order. Based on the testimony of the parties, however, it would appear that Ameritech did not always follow its official BFR process and on at least some occasions waived the $2,000 nonrefundable deposit and provided special construction cost estimates in far less time than four months. Under what circumstances and how frequently Ameritech deviated from its written BFR process is unclear.

3. Ameritech's policy as of January 1, 2000

Effective January 1, 2000, approximately two months after this investigation began, Ameritech revised its special construction policy applicable to CLECs on its TCNet. Ameritech witness Suthers testifies that the revisions are the result of Ameritech's new interpretation of its "UNE special construction tariff" in light of SBC Communications, Inc.'s ("SBC") policies concerning loop availability and construction and the FCC's UNE Remand Order.

Mr. Suthers describes TCNet as a password-accessible web site created and maintained by Ameritech for the purpose of communicating general Ameritech policies on a variety of issues to CLECs. He states that all CLECs that have signed a non-disclosure agreement with Ameritech, the FCC, and the regulatory agencies in the five Ameritech region states have access to TCNet. CLECs logging onto TCNet are shown the date of the last update and can obtain a list of items changed by that update, according to Mr. Suthers. In addition, he indicates that CLECs that provide Ameritech will an e-mail address receive an e-mail notifying them that a change has been made on TCNet. Mr. Suthers contends that policy statements on TCNet deal with administrative matters and implementation issues at a level of detail beyond what would be appropriate or practical in an interconnection agreement. In the event of a conflict between an interconnection agreement and TCNet, Mr. Suthers states that the agreement would control. He argues that TCNet needs to remain free of Commission oversight because Ameritech is constantly developing and revising its policy positions on the implementation and interpretation of issues arising in interconnection agreements.

Among the January 1, 2000 revisions to Ameritech's special construction policy is a new definition of "available." As of January 1, Ameritech witness Suthers indicates that a loop, or other UNE, is "available" if all of its major components are physically present. Such a UNE is "available" even if modifications are necessary to provide the UNE or make it compatible with the CLEC's requirements, such as conditioning. TCNet also relates that Ameritech may agree to provide UNEs that are not "available" through a BFR, but is not required to do so. Ameritech's official written BFR process did not change on January 1, although it appears that Ameritech began to adhere more closely to its official BFR process.

TCNet divides available loops into three different categories: (1) Loop Available - No Modifications, (2) Loop Available - Modifications to be Included in Loop Charges, and (3) Loop Available - Modifications Provided at Additional Charges. Under the first category, available loops are provided without modification since all major components of the loop are both physically present and contiguous.

Under the second category, TCNet indicated that six specific modifications would automatically be performed where necessary to provision a loop and a flat-rate interim charge would be assessed on the CLEC. In Illinois, the interim charge would be $224.07 per modification. Ameritech plans for the costs associated with these modification-related activities to be reflected in the applicable total element long-run incremental cost ("TELRIC") studies as filed in future state cost proceedings and recovered through UNE nonrecurring rates. The six activities may be characterized as "complex work" and include: (1) line station transfers, (2) clearing (repairing) a defective pair, (3) installing plug-in cards, (4) wire out of limits, (5) break and connect through, and (6) installing pair gain devices.[3] What distinguishes complex work from a simple dispatch, according to Mr. Florence, is the amount of labor involved. While there is no definitive cut-off in terms of hours involved, Mr. Florence testifies that Ameritech's cost studies reveal that complex work requires more time to complete than a simple dispatch. Since, according to Ameritech, the costs associated with complex work are not included in the monthly rates that CLECs pay for unbundled loops, Ameritech decided to recover those costs through special construction charges.

Mr. Suthers and Staff witness Phipps both provide descriptions of the six types of complex work activities. Since the descriptions offered by the latter are clearer than those offered by the former, Mr. Phipps' descriptions have been relied upon. He begins by stating that a line station transfer involves converting an Ameritech end user from non-integrated facilities to integrated facilities for the purpose of freeing up a copper loop for a CLEC's use. He states that Ameritech would attempt a line station transfer when a CLEC requests a loop in an integrated environment where no unused copper loops are available for the CLEC's use. Mr. Phipps testifies that clearing a defective pair occurs when a problem with a loop renders it unusable. In such an instance, he reports that an Ameritech technician would identify the problem with the loop and fix it. Ameritech would install plug-in cards in a remote terminal ("RT") and central office terminal ("COT"), according to Mr. Phipps, to unbundle a loop in an IDLC environment. If, however, Ameritech finds that there are not enough plug-in cards in the COT and RT for a CLEC to use, Mr. Phipps testifies that Ameritech often assesses additional charges to recover the cost of the plug-in cards as well as installing them. COT and RT technology will be discussed in greater detail in the context of IDLCs and RSUs below. Mr. Phipps indicates that Ameritech will perform the fourth type of complex work, wire out of limits, when a CLEC requests a loop at a terminal where no spare copper facilities exist. Performing a wire out of limits, he states, entails connecting the

[3] TCNet actually identifies seven activities. For purposes of this proceeding, however, the sixth and seventh (PG Plus and Universal Digital Carrier, respectively) have been combined and described as installing pair gain devices.

requested loop to an adjacent terminal with spare facilities. Mr. Phipps adds that wire out of limits is very similar to item C of Ameritech's tariff Ill. C. C. No. 20, Part 2, Section 5 Original Sheet No. 1. Breaking and connect through, as Mr. Phipps understands it, involves breaking a connected circuit at a terminal where no service is being provided at that customer location, and connecting that circuit to a different customer location. The final type of complex work activity consists of installing pair gain devices. When no spare copper loops are available, Mr. Phipps asserts that Ameritech can use a pair gain device to expand the capacity of single copper loop by six times by deriving six pairs from a single pair.

Under the third category of available loops, such loops will be provided in conjunction with loop conditioning and modifications to IDLCs and RSUs. TCNet relates that loop conditioning and such modifications will be provided at an additional TELRIC based charge, which will be developed and implemented on a state-by-state basis. Loop conditioning and IDLCs and RSUs will be addressed separately.

a. Loop Conditioning

The term "conditioning" refers to the addition or removal of equipment on a loop to improve its transmission characteristics for a particular purpose. In the context of this docket, conditioning refers to the removal of equipment on a voice grade loop to enhance the loop's ability to carry data transmissions. Many CLECs seek to provide digital subscriber line ("DSL") service and/or integrated services digital network ("ISDN") service over unbundled loops acquired from Ameritech. Many types of DSL service exist; when referred to generally, however, it is known as "xDSL." For the purposes of this proceeding, xDSL and ISDN services are substantially similar; the only difference being transmission speed. In order to provide xDSL or ISDN services, load coils, range extenders, bridged taps, low pass filters, and repeaters must be removed from a voice grade loop. This is true regardless of whether it is Ameritech or a CLEC using the loop to provide xDSL or ISDN services. TCNet indicates that an additional TELRIC based charge will be assessed for the removal of such equipment. Ameritech argues that an additional charge is justified because the cost of loop conditioning is not included in the monthly rates that CLECs pay for unbundled loops and because the FCC requires Ameritech to recover its costs. Accordingly, Ameritech asserts that it should be allowed to recover any costs associated with loop conditioning as special construction charges until TELRIC based rates are approved by the Commission.[4]

b. IDLCs and RSUs

To understand the technology involved with the disaggregation of RSUs and IDLCs, it is helpful to be familiar with digital loop carrier ("DLC") technology generally. With advances in digital technology, it became possible to improve efficiency and service with DLC systems. A DLC system serves multiple customers with fewer copper

[4] The development of TELRIC based rates for loop conditioning will be addressed further below in the context of FCC's merger order approving the reorganization of SBC and Ameritech's parent company.

feeder facilities. For example, it is possible to electronically aggregate, or multiplex, the analog loops serving 24 remotely located customers (i.e., 24 distribution pairs) onto a single high capacity digital facility for transmission back to the central office. The DLC consists of a RT located near the cross-connect box, which multiplexes the distribution pairs, and a COT, which demultiplexes the digital signal back into individual analog channels which are connected to the MDF and then connected to the central office switch. The switch provides the link to the rest of the network. The RT and COT are connected by high-capacity digital circuits. For loops purchased by a CLEC, after being individually demultiplexed at the COT and sent on to the MDF, such unbundled loops are then routed to the CLEC's collocated switch rather than to Ameritech's central office switch. This type of DLC is referred to as non-integrated or universal DLC ("UDLC").

IDLC facilities differ from UDLC facilities in that no demultiplexing occurs at the central office. Instead, analog loop signals are converted to digital signals and integrated at the RT. The integrated loops then lead into Ameritech's digital central office switch, eliminating the need to convert the signal from digital to analog and bypassing the MDF. In some situations, however, where a LiteSpan DLC is employed, loops can still be unbundled from IDLCs. With LiteSpan DLC, a RT sends digital signals to a LiteSpan DLC COT equipped with the appropriate plug-in cards in a central office. There, the plug-in cards route the demultiplexed unbundled individual loops to the MDF, which then sends the signal on to the collocated switch of the CLEC paying for the unbundled loop. Those loops still utilized by Ameritech are routed from the LiteSpan DLC COT to Ameritech's digital switch. Without the appropriate plug-in cards, LiteSpan DLC facilities can not be used to unbundle a loop. When LiteSpan DLC facilities are not present, Ameritech maintains that such loops can not be unbundled without additional special construction and the associated charges since the integrated loops connect directly to its switch.

RSUs present the same issues as IDLCs. Ameritech describes RSUs as "mini-switches." They function like loop integrators but also provide dial tone to the end users served by the RSU, thus permitting some localized calling even in the event of a central office malfunction. RSUs have limited stand-alone capability, since most of the intelligence resides at the central office host switch. RSUs are connected to the host switch by fiber optic facilities and associated circuit equipment commonly called host-remote umbilicals. Ameritech witness Florence states that the umbilical is used to carry control signals between the host and remote switch and to connect calls to any location not served by that RSU. According to Mr. Florence, the engineering of the host-remote umbilical does not allow it to be unbundled. Therefore, whenever a CLEC requests that a loop served by an RSU be unbundled, Ameritech asserts that special construction must be performed and charges assessed.

The special construction that Ameritech's TCNet maintains must be performed to unbundle a loop in the presence of IDLCs and RSUs consists of installing new COTs or RTs or the construction of a parallel facility. Such activities will be performed at

additional charges, according to TCNet. As an alternative to constructing new COTs, RTs, or parallel facilities, TCNet states that Ameritech will offer unbundled sub-loops consistent with currently effective FCC rules. Paragraph 206 of the UNE Remand Order defines subloops as portions of a loop that can be accessed at terminals in the ILEC's outside plant. TCNet further indicates that unbundled loops served via IDLC or RSU will be unbundled at no extra charge "where such loops can be provisioned though a Line and Station Transfer (LST) or the addition or replacement of [plug-in cards] in an existing COT/RT will be provided pursuant to Section 5.4.1,..." (McLeod Ex. 1 1)

Because, according to Ameritech, the costs associated with installing new COTs or RTs or the construction of a parallel facility are not included in the monthly TELRIC rates that CLECs pay for unbundled loops, and because Ameritech understands the FCC to require it to recover its costs, Ameritech's witnesses argue that it is proper to recover the alleged costs through special construction charges. Notably, neither Mr. Suthers nor Mr. Florence discuss any efforts to develop TELRIC based charges for providing loops from IDLCs and RSUs, which is what Ameritech intends to do according to TCNet.

4. Ameritech's policy as of February 2, 2000

On or about February 2, 2000, Ameritech again revised its special construction policy as it relates to CLECs. It is this version of Ameritech's policy which will be addressed in this proceeding. Although the BFR process and definition of "available" remain unchanged from the January 1 version of the policy, TCNet indicates that orders received by Ameritech that are found to have no facilities "available" will be cancelled and sent back to the CLEC. TCNet reports that Ameritech may agree to provide loops that are not "available" through a BFR, but is not required to do so. The other significant revision to the policy is that there is no longer a flat-rate interim charge for the complex work activities. Ameritech still maintains that it incurs costs for these activities that are not currently recovered in its TELRIC rates. Rather than assess special construction charges to recover these costs, however, Ameritech intends to add the alleged unrecovered costs to its TELRIC rates in Docket No. 98-0396. Because it no longer seeks to recover the costs it allegedly incurs when it performs complex work through special construction charges, Ameritech maintains that such costs are beyond the scope of this docket.

5. Determining the need for special construction and calculating charges

Upon receiving a request for an unbundled loop, Ameritech witness Suthers testifies that Ameritech engineers determine whether a loop is available. Although he believes the procedures followed by the engineers in making this determination are in writing, he is not certain. Mr. Suthers states that at any time while Ameritech is preparing to fill a CLEC order for a loop, it may determine that special construction

charges are necessary and then cancel the order. Once it determines that special construction is necessary, he indicates that Ameritech notifies the CLEC of such. The CLEC must then request that Ameritech calculate the amount of the special construction charges through the BFR process, according to Mr. Suthers. He further states that time and materials are the primary cost factors in special construction charges; but again, is not sure if there are any particular written procedures governing how to calculate special construction charges.

In some instances where CLECs have requested an unbundled loop, CLEC witnesses testify that they have received notices from Ameritech that specific special construction charges must be paid before the loop is provisioned. For one reason or another, the order for the particular unbundled loop is cancelled and resubmitted by the same CLEC. The second time, however, the CLEC witnesses report that Ameritech demands a different amount of special construction charges for the same loop. Mr. Suthers confirms that this outcome is possible, but attributes it to new information becoming available or the chance that different engineers may make different assessments of what needs to be done to fill a UNE order.

IV. AVAILABILITY

Section 251(c)(3) of the TA96 and the FCC's First Report and Order direct ILECs to provide to CLECs nondiscriminatory access to certain facilities. How Ameritech defines the term "available," as it is used in its tariff, is very significant since it establishes the particular facilities to which Ameritech must provide CLECs access. (*See* Ill. C. C. No. 20, Part 19, Section 1, Original Sheet 4.4) It is important to distinguish that it is the availability of facilities that is the focus of this section, and not the services provided over those facilities to Ameritech's retail customer and CLECs' end users.

A. Ameritech's Position

As indicated above, Ameritech considers a UNE available when all major components are physically present, even where modifications are required to provide the UNE or make it compatible with the CLEC's requirements. Ameritech argues that this definition is consistent with the TA96 and relies on Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), for the proposition that Section 251(c)(3) implicitly requires unbundled access only to an ILEC's *existing* network. Ameritech goes a step further and claims that it has no duty to provide a UNE unless "it is physically connected to [Ameritech's] network and is easily called into service." (UNE Remand Order, ¶174, fn.323 and ¶328) Ameritech quotes this language from the FCC's discussion of dark fiber and why it is distinguishable from unused copper wire stored in a spool in a warehouse. In light of his reading of the UNE Remand Order, Ameritech witness Suthers finds the definitions offered by Mr. Graves and Mr. Starkey to be without practical limits. Both definitions are described in full below.

B. Staff's Position

Staff recognizes the importance of how "available" is defined and asserts that Ameritech has an incentive to interpret this term in ways that limit its obligation to provide UNEs. Staff witness Graves urges the Commission to reject Ameritech's definition of "available." He argues that Ameritech's current position does not adequately resolve when a loop is available. Specifically, he states that Ameritech's definition does not address the issue of when Ameritech can deny CLECs access to loops or require a BFR to obtain a loop. In addition, Staff maintains that permitting Ameritech to impose its own definitions allows it to unilaterally alter its obligation to provide unbundled loops. Any revisions to this policy should be memorialized in Ameritech's tariff in order to assure the Commission and CLECs of some reasonable continuity in the definition, according to Mr. Graves. He testifies further that the section describing "facility availability" in Ameritech's "Unbundled Loops Ordering Guide" has changed five times since December, 1999.

Mr. Graves also contends that Ameritech's current definition does not adequately address how Ameritech defines "no spare loops." After reviewing the list of UNE orders for which Ameritech assessed special construction charges, he observes that "no spare loops" seems to appear quite often as a justification for charges. Mr. Graves testifies that it would be very unusual for a company with the size and resources of Ameritech to run out of loops. After citing proprietary language from Ameritech's Cost Analysis Resource ("ACAR") in his direct testimony, he concludes that "no spare loops" should be an extremely rare occurrence. Staff states that Ameritech's cost and engineering guidelines are designed to avoid instances were facilities are exhausted. Mr. Graves notes that Staff witness Phipps reports that Ameritech's fiber optic utilization rates are typically 33%.

In light of these concerns, Mr. Graves recommends that the Commission adopt an alternative definition of "available." He asserts that the definition used by the Michigan Public Service Commission ("MPSC") in In the matter of the complaint of BRE Communications, L.L.C., d/b/a Phone Michigan, against Ameritech Michigan for violations of the Michigan Telecommunications Act, Case No. U-11735 (February 9, 1999), is appropriate. This definition is as follows:

> the Commission agrees with the ALJ and Staff that a loop is unavailable, within the meaning of that term in the interconnection agreements, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. (Id., p. 15)

Mr. Graves maintains that the Commission should adopt this definition because it will discourage inefficient network management where Ameritech may label facilities "unavailable" in order to make loops unavailable to CLECs or to force CLECs to go through an expensive and time consuming BFR process. The BFR process, according

to Staff, has important anti-competitive effects. First, Mr. Graves states that it requires a CLEC to either come up with a $2,000 deposit or agree to promptly pay the total preliminary costs that will be assessed by Ameritech without third-party review or Commission approval. Such costs, he contends, may be a barrier to entry. In addition, Mr. Graves observes that the BFR process can also lead to delays in provisioning service, since Ameritech may take up to 90 days just to quote a price for special construction.

Staff does not respond to Ameritech's assertions that the "MPSC" definition fails to limit the provision of UNEs to items that are currently "physically connected" to its network and are "easily called into service," as Ameritech believes the UNE Remand Order requires. Nor does Staff comment on the fact that the FCC issued the UNE Remand Order after the MPSC adopted the definition supported by Staff, as noted by Ameritech. Mr. Starkey, testifying on behalf of McLeod, Ovation, MCI WorldCom, and Allegiance, however, testifies in support of the MPSC's definition as an alternative to the definition that he offers.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

Mr. Starkey argues that Ameritech's definition of "available" discriminates against CLECs by allowing Ameritech to charge CLECs for special construction far more often than it charges its own retail customers for special construction. Mr. Starkey recommends that the Commission adopt the following definition:

> *Available Facility*. An *available facility* is a facility, or combination of facilities, that can be made to provision a Network Element. While a facility or combination of facilities will be considered to be available even when some modification, construction or other manipulation of Ameritech's network is required to provision the facility as a retail service or an unbundled network element, a facility may not meet the definition of an *available facility* if activities consistent with those specifically identified in Ameritech's Tariff Ill. C.C. No. 20, Part 2, Section 5 must be undertaken so as to ready the facility for use.

Mr. Starkey argues that this definition is consistent with the definition of "available" adopted by the MPSC, and is in a form which could be inserted in Ameritech's UNE tariff and its interconnection agreements.

McLeod, Ovation, MCI WorldCom, and Allegiance argue that making clear the meaning of the term "available" for purposes of Ameritech's interconnection agreements and UNE tariff is important. Regardless of the specific definition ultimately chosen, however, they insist that the most important requirement is that the term be defined in the same manner for all users of the Ameritech network to avoid discrimination. In other words, if a network element is considered to be "available," and can be provisioned without delay and without special construction charges, it must be

equally "available" for retail customers, Ameritech affiliates, and CLECs alike. Thus, if Ameritech does not assess special construction charges for a particular activity pursuant to its retail tariff (which will govern the charges assessed to its retail customers), McLeod, Ovation, MCI WorldCom, and Allegiance aver that Ameritech would have no right to assess charges to a CLEC under similar circumstances. Through such a policy, they believe that the Commission can help to ensure that competing carriers are treated similarly to retail customers.

Moreover, McLeod, Ovation, MCI WorldCom, and Allegiance assert that the Commission must prevent Ameritech from redefining "available" whenever it wants. By doing so, they contend that Ameritech is effectively rewriting its interconnection agreements and UNE tariff in a manner that would allow it to charge special construction charges whenever it desires, in violation of the TA96. While Ameritech's motivation is clear -- as its witness Suthers admitted, Ameritech would prefer its competitors not purchase UNEs, but instead buy wholesale services, and preferably not compete at all (Tr. 166-67) -- McLeod, Ovation, MCI WorldCom, and Allegiance aver that CLECs are entitled to compete, and to choose the method by which they will enter the market. Ameritech must not be allowed, they maintain, to make it cost prohibitive for CLECs to compete using UNEs by imposing unwarranted special construction charges. According to McLeod, Ovation, MCI WorldCom, and Allegiance, the Commission can prevent this from happening by defining "available" in the same manner as the MPSC to mean that facilities are available in all areas except those "not presently served by Ameritech," and require Ameritech to provision unbundled elements without assessing special construction charges unless Ameritech would charge its retail customer for the same "special construction" under its tariff.

Mr. Starkey also asserts that Mr. Suthers' criticisms of his proposed definition are unjustified. Mr. Suthers testifies that his principal objection to Mr. Starkey's definition is that the word "construction" has no limits. Mr. Suthers claims that Mr. Starkey's definition could require Ameritech to build an entire new network where none currently exists; which would eviscerate the notion that Ameritech is only required to unbundle its existing network. Even the "construction" of a new loop would violate the FCC's standard, as Mr. Suthers understands the UNE Remand Order. Mr. Suthers also objects to Mr. Starkey's reference to Ameritech's "retail special construction tariff" in his definition. He argues that such a reference is inappropriate because UNEs and retail services are not comparable and Ameritech's tariff reflects such.

With regard to the assertion that his definition is without limits, Mr. Starkey contends that his reference to Ameritech's "retail special construction tariff" does in fact limit the scope of his definition. The entire rationale behind his definition, he maintains, is that it would limit Ameritech's ability to assess special construction charges on CLECs to only those circumstances wherein Ameritech assessed similar charges on its retail customers. Hence, according to Mr. Starkey, Ameritech, pursuant to his definition, would be required to make a facility available as a UNE without additional charge, including the need for any "construction or other manipulation," if Ameritech

generally undertook the same type of construction or network manipulation on behalf of its retail customer at no additional charge.

In response to Mr. Suthers' argument that Ameritech is only obligated to provide access to its existing network, Mr. Starkey asserts that CLECs have not asked Ameritech to construct a "new" or "superior" network for purposes of gaining access to that network via UNEs. Mr. Starkey avers that none of the circumstances within which Ameritech has attempted to assess special construction charges pertain to doing anything other than provisioning facilities using Ameritech's *existing* network, just as Ameritech would do to provision service to its own retail customers. The issue at hand, he contends, is not whether Ameritech should be required to build a new or improved network for use by its competitors, but whether Ameritech should provide nondiscriminatory access to the network it currently owns and manages. Mr. Starkey states that the United States District Court for the Eastern District of Michigan, Southern Division, supports his position, as may be ascertained from its decision affirming the aforementioned MPSC order. (*See* Michigan Bell v. Strand, et al., Case No. 99-CV-71180-DT (E.D. Mich. Jan. 4, 2000))

Mr. Starkey further asserts that the alleged "physically connected" and "easily called into service" standard that Ameritech relies upon has been taken out of context and that the FCC never meant to impose such a standard for UNEs. He contends that this "standard" is a prime example of how Mr. Suthers picks and chooses phrases and words to construct a policy that Ameritech prefers, instead of the policy that the FCC actually adopted. Although Ameritech cites paragraph 328 of the UNE Remand Order as the source of its standard, Mr. Starkey urges the Commission to review paragraphs 327 through 330 to put Ameritech's standard in the proper context. These paragraphs concern the FCC's conclusion that ILECs must offer interconnectors access to dark fiber because it is a network element. Mr. Starkey specifically points to paragraph 327 where the FCC states its agreement with this Commission that the phrase "used in the provision of a telecommunications service" in Section 153(29) of the TA96 refers to network facilities or equipment that is customarily employed for the purpose of providing a telecommunications service. The obvious intent of this portion of the UNE Remand Order, according to Mr. Starkey, is to more expansively define Ameritech's unbundling obligation, not, as Mr. Suthers contends, to limit that obligation.

D. Rhythm and Covad's Position

Rhythms and Covad also assert that Ameritech's definition of "available" is unreasonable. Specifically, Rhythms and Covad argue that Ameritech's definition is problematic for at least two reasons. First, they contend that the definition gives Ameritech no incentive to plan for growing demand in its network. Because demand will increase over time and will require installation of new facilities, Rhythms and Covad maintain that Ameritech's current definition of "available" allows Ameritech to deny a CLEC's request for a UNE simply because Ameritech has failed to keep up with that demand. Second, Rhythms and Covad claim that Ameritech's new definition of

"available" has undermined CLECs' ability to compete in Illinois. They cite a sharp increase in the number of their orders that were cancelled by Ameritech because of an alleged lack of facilities following the implementation of Ameritech's new definition. Rhythms and Covad assert that Ameritech's actions constitute discrimination because Ameritech denies CLECs access to these facilities, but does not deny service to retail customers under such circumstances.

Rhythms and Covad argue that the definition of "available" is important because it is used both in Ameritech's interconnection agreements and its UNE tariff to define the circumstances under which Ameritech will provide access to UNEs and assess special construction charges on a CLEC. Section 9.1.3 of Ameritech's interconnection agreement with Rhythms requires Ameritech to make available access to its network elements where such network elements are "available." Where a network element is not available, section 9.1.3 calls for Rhythms to pay Ameritech "any applicable special construction charges" if Ameritech makes available access to a network element requiring special construction. *(Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act Of 1996, Dated as of August 18, 1998, by and between Ameritech Information Industry Services, and Accelerated Connections, Inc.)* Ameritech's interconnection agreement with Covad contains similar language.

Covad witness Evans and Rhythms witness Lopez note that Ameritech has repeatedly made fundamental changes to its special construction charges policy. Ameritech implemented such changes unilaterally, without Commission approval, by posting its new policy on TCNet. Rhythms and Covad state that such changes essentially amount to a unilateral modification of a critical term in Ameritech's UNE tariff and interconnection agreements, without prior notice to the affected CLECs or review by the Commission.

E. Commission Conclusion

As indicated above, the definition of "available" is crucial to the determination of when Ameritech is obligated to provide a CLEC access to particular UNE facilities. If particular facilities are determined not to be "available," ILECs have no duty to provide CLECs access to such facilities. As a general proposition, it may be said that the narrower the definition, the fewer opportunities CLECs will have to compete. Accordingly, Ameritech has an incentive to narrowly define "available" so as to impair CLEC's ability to compete.

Ameritech does not define "available" in its tariff, nor is there any indication that any of its interconnection agreements define the term. The only place where Ameritech is known to post its definition of "available" is TCNet. Ameritech witness Suthers asserts that TCNet is meant to deal with administrative matters and implementation issues and must remain free from Commission oversight because Ameritech is constantly developing and revising its policy positions on the implementation and interpretation of issues arising in interconnection agreements. The Commission rejects

this approach to defining such a crucial term as entirely inappropriate and discriminatory in its effect on CLECs.

While the Commission does not criticize Ameritech's use of TCNet in general and does not at this time seek to exercise oversight of the content of TCNet, the Commission does not believe that it is appropriate to relegate the definition of such an important term to an instrument subject to regular revision without oversight. Clearly, when a UNE facility is available is not an administrative matter or implementation issue. The fact that Ameritech's most recent revision of its definition of "available" is to the benefit of CLECs does not mitigate the Commission's concern. Furthermore, the record is devoid of any legitimate reason why Ameritech must be free to revise the definition of "available" as it sees fit. On the contrary, Ameritech's unilateral revisions of the definition of "available" on TCNet suggest that this definition belongs in Ameritech's tariff. If included in the tariff, interested entities may count on the continuity of the definition and will have an opportunity to comment on any proposed revisions. Accordingly, the Commission orders Ameritech to place the definition of "available," as it pertains to facilities, in its tariff. Ameritech is free to post the same definition on TCNet as well, with the understanding that the tariff overrides TCNet.

The Commission also notes that the TCNet discussion of available loops derived from IDLCs and RSUs appears to be inconsistent with Ameritech's tariff language concerning unbundled loops in the presence of IDLCs and RSUs. (*See* Ill. C. C. No. 20, Part 19, Section 1, Original Sheet No. 4.4) While TCNet characterizes loops from IDLCs and RSUs as being available, Ameritech's tariff suggests that such loops are not available. Specifically, the tariff states that a CLEC must make a BFR for an unbundled loop served by an IDLC or RSU if no spare physical loops exist and the CLEC still wants the loop. Since under its BFR process, Ameritech is not obligated to provide the requested unbundled loop, the tariff is understood to mean that loops served by IDLCs and RSUs are not "available." TCNet, on the other hand, describes the same situation and states that additional charges will be assessed to provide the loop without ever mentioning the BFR process. Thus, TCNet implies that an unbundled loop is always available and no BFR is necessary. Although the tariff clearly overrides TCNet, Ameritech's own position on loop availability is internally inconsistent.

TCNet's discussion of when unbundled loops served via IDLC or RSU will be unbundled at no extra charge is also difficult to understand. Ameritech seems to indicate that a line station transfer or the addition/replacement of plug-in cards will be performed to unbundle an available loop served by an IDLC or RSU at no extra charge pursuant to TCNet's first category of available loops, which require no modifications. Yet under TCNet's second category of available loops, Ameritech identifies these two types of activities as modifications having unrecovered costs associated with them, necessitating their recovery as special construction charges or as part of the monthly TELRIC rates paid by CLECs. The Commission can not determine what Ameritech intends to convey through this portion of TCNet.

In any event, the Commission finds merit in Staff's and the CLECs' concerns regarding Ameritech's definition of "available" and concludes that Ameritech's current definition does not provide (1) adequate parameters for determining in advance whether a UNE will be available and (2) sufficient safeguard against discriminatory implementation. Under Ameritech's definition, a CLEC will not know if a UNE is available until it told so by Ameritech. With regard to Ameritech's contention that its definition is consistent with the Eighth Circuit's determination that it is only obligated to provide unbundled access to its existing network, the Commission agrees with Mr. Starkey that the evidence presented indicates that CLECs have not sought access to a new or superior network, but only access to the network that Ameritech presently owns and manages on a nondiscriminatory basis.

As for Ameritech's alleged "physically connected" and "easily called into service" standard, the Commission agrees with Mr. Starkey that such language has been taken out of context. The language that Ameritech relies upon appears in the FCC's discussion of why some facilities, which may be considered similar in nature to dark fiber, that an ILEC customarily uses to provide service, such as unused copper wire stored on a spool in a warehouse, should not constitute network elements. The Commission does not understand the FCC to mean that an ILEC has no duty to provide a UNE unless "it is physically connected to the incumbent's network and is easily called into service." Rather, the Commission views the quoted language as a means to distinguish the type of UNE known as dark fiber. Had the FCC intended such a significant standard to apply to all UNEs, the Commission believes that the FCC would have clearly done so. In addition, it is not clear that Ameritech's current definition would comply with the alleged standard since its definition only requires the physical presence of all major components and does not mention anything about being "physically connected."

In adopting a new definition of "available," the Commission is not convinced that Mr. Starkey's proposed definition properly conveys the manner in which special construction charges should be assessed. Mr. Starkey's definition indicates that a facility may not be available if special construction is necessary under Ameritech's tariff Ill. C. C. No. 20, Part 2, Section 5. Contrary to Mr. Starkey's opinion, the determination of whether special construction must occur should not influence the determination of whether a facility is available.

Mr. Starkey also urges the Commission to adopt a definition of "available" applicable to all users of Ameritech's network in order to avoid discrimination. This suggestion has merit. By adopting a uniform definition for CLECs, retail customers, and Ameritech's affiliates, all will begin the process of obtaining service at the same point. This conclusion is separate from a discussion of whether UNEs requested by CLECs are comparable to the services requested by Ameritech's retail customers. The comparability of UNEs and services to retail customers will be addressed below.

The remaining proposed definition is the one offered by Staff. The Commission concurs with Staff's arguments in support of the MPSC's definition, but believes that the it should be modified to read more clearly. Therefore, consistent with the TA96 and the FCC's order, a facility is available if it "is located in an area presently[5] served by" Ameritech. This definition, applicable to CLECs, retail customers, and Ameritech's affiliates, will discourage inefficient network management and enable those requesting facilities to more accurately predict whether such facilities will be available. Accordingly, Ameritech is directed to modify its tariff to reflect this conclusion.

V APPLICABILITY OF SPECIAL CONSTRUCTION TARIFF

With the knowledge of what constitutes an available facility, it must now be determined when it is appropriate to assess special construction charges. As indicated above, Ameritech assesses special construction charges on its retail customers when the conditions of its "retail special construction tariff" have been met. Ameritech's "UNE special construction tariff" only indicates that Ameritech will assess special construction charges when special construction is required. The aforementioned TCNet policy states that such charges will be assessed on CLECs whenever loop conditioning and/or modifications to IDLCs and/or RSUs are necessary to provision a loop. The issue has been raised in this proceeding whether the conditions listed in Ameritech's "retail special construction tariff" should govern when special construction charges are assessed on CLECs.

A. Ameritech's Position

As discussed in Section III.B.1.a., Ameritech argues that its "UNE special construction tariff" preempts its "retail special construction tariff." The latter is more specific, according to Ameritech witness Suthers, because it is intended to be more restrictive while the former is intentionally not limited to any specific circumstances. Mr. Suthers testifies that the differences between these two portions of Ameritech's tariff are substantive because retail (or wholesale/resale) services are not comparable to UNEs.

Ameritech's arguments as to why UNEs and retail services are not comparable will be discussed in greater detail in the context of discrimination in Section VII, below. For the purpose of determining which portion of Ameritech's tariff should govern the assessment of special construction charges on CLECs, a summary of Ameritech's arguments differentiating UNEs and retail services will suffice. First, Mr. Suthers asserts that a UNE is not functionally comparable because it does not have any functionality on its own. Retail service, on the other hand, is a bundled end-to-end telecommunications service. Second, Mr. Suthers states that CLECs order UNEs with particular specifications while Ameritech decides exactly how it will provision the service requested by the retail or wholesale/resale customer. Third, Ameritech argues

[5] The term "presently" refers to the time at which a facility is requested.

that the rate structure behind UNEs and retail service is different. Retail rates, according to Ameritech witness Florence, recover more of Ameritech's special construction costs, via contribution from all retail customers, than do Ameritech's UNE rates. Mr. Suthers argues that Ameritech's tariff is written in recognition of the different rate structures. Fourth, Mr. Suthers contends that the FCC and this Commission have recognized that UNEs are not comparable to retail services and that CLECs are not comparable to retail end users. Finally, he claims that equating the purchase of UNEs with the purchase of retail services would not be sound policy because it would lead to absurd results—CLECs could order service at retail costs and/or retail customers would pay TELRIC rates. In summary, Mr. Suthers argues that the proper comparison is between how Ameritech treats a CLEC and how its treats other CLECs, itself, and its affiliates with respect to UNEs.

B. Staff's Position

Staff witness Graves favors the application of the nine conditions in Ill. C. C. No. 20, Part 2, Section 5, Original Sheets Nos. 1 and 2 to CLECs requesting UNEs. Specifically, he disagrees with Mr. Suthers that Ameritech's "UNE special construction tariff," Ill. C. C. No. 20, Part 19, Section 1, overrides the special construction language in Part 2 of Ameritech's tariffs. The language in Part 19, according to Mr. Graves, does not exclude the application of the terms and conditions in Part 2. In fact, he continues, the language of Part 19 relies on the terms and conditions in Part 2. The former expressly refers to "special construction" and "applicable special construction charges," which Mr. Graves states are defined in Ill. C. C. No. 20, Part 2, Section 5. Because these terms are defined in Part 2, he asserts that Ameritech's only basis for charging CLECs nonrecurring charges for construction related to local loops is if those charges are permissible under Part 2 of Ameritech's tariffs.

Mr. Graves also objects to Mr. Suthers' position that special construction charges for CLECs should not be limited to any specific circumstances. This position, according to Mr. Graves, violates Section 9-104 of the Act, which states:

> No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such services, product or commodity, have been filed and published in accordance with the provisions of this Act: Provided, that in cases of emergency, a service, product or commodity not specifically covered by the schedules filed, may be performed or furnished at a reasonable rate, which rate shall forthwith be filed and shall be subject to review in accordance with the provisions of this Act.

If Ameritech performs special construction for any customer, Mr. Graves believes that the Act requires Ameritech to do so in accordance with charges, classifications, rules, and regulations that have been filed and approved by the Commission. In the absence

of any specifics in Ill. C. C. No. 20, Part 19, Section 1, he maintains that Ill. C. C. No. 20, Part 2, Section 5 is the only authority under which Ameritech may assess special construction charges on CLECs.

Staff witness Phipps echoes Mr. Graves concerns when he states that Ameritech's policy is very subjective because there are no official guidelines to follow, which leads to many inconsistencies in administering special construction charges. Mr. Phipps relates that in response to data requests, CLECs report that sometimes Ameritech meets the 48 hour time-frame in Ill. C. C. No 20, Part 19, Section 1 for notifying CLECs of the availability of facilities and sometimes it exceeds the time-frame, sometimes Ameritech provides its notice in writing and sometimes notice is provided verbally, and sometimes Ameritech explains why the charges are necessary and sometimes it provides no explanation. He also indicates that special construction charges vary greatly for similar activities.

C. McLeod, Ovation, MCI WorldCom, and Allegiance's Position

Mr. Starkey concurs with Mr. Graves on this issue. In his aforementioned proposed definition of "available," Mr. Starkey recommends relying upon Ameritech tariff Ill. C. C. No. 20, Part 2, Section 5 to determine when a facility should be deemed available. McLeod, Ovation, MCI WorldCom, and Allegiance also strongly disagree with Ameritech's arguments that UNEs and retail services are not comparable. They argue in part that the fact that Ameritech has a "retail special construction tariff" and a "UNE special construction tariff" demonstrates that comparisons can be made. Not only is it reasonable to use the "retail special construction tariff" as a tool to interpret the UNE tariff (in terms of determining when special construction charges will be assessed), but use of the retail tariff ensures that Ameritech assesses special construction charges in a nondiscriminatory manner between its retail customers and UNE customers, according to the four CLECs.

D. Commission Conclusion

As described above, Ameritech primarily sets forth when CLECs will pay special construction charges on TCNet.[6] Just as the Commission finds defining "available" on TCNet inappropriate, the Commission also concludes that it is not proper to establish through TCNet situations under which CLECs must pay special constructions charges. A determination with such a potentially significant impact on CLECs is not merely an administrative or implementation issue and should not be left to an instrument subject to regular revision without oversight.

Ameritech's initial objection to using Ill. C. C. No. 20, Part 2, Section 5 of its tariff for determining when CLEC's should pay special construction charges for available UNEs is based on its interpretation and application of the following statement from Ill.

[6] The exception being the discussion in Ameritech's "UNE special construction tariff" of the BFR process in the context of providing an unbundled loop served by IDLCs or RSUs.

C. C. No. 20, Part 19, Section 1, Original Sheet No. 1: "General Regulations as found in Part 2 of this tariff apply to this Part unless otherwise specified in this Part." In short, Ameritech believes that the language that follows this statement on Original Sheet No. 4.4 of Part 19, Section 1 sufficiently "specifies" that Part 2, Section 5 does not apply to Part 19. The Commission is not persuaded by this argument. The Commission first notes that Ameritech's "UNE tariff" at no point expressly states that the list found on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 shall not apply to Part 19. Nor does Ill. C. C. No. 20, Part 2, Section 5 contain any language restricting its applicability to retail customers.

The only manner in which Ameritech's "UNE tariff" possibly "specifies" that Part 2 does not apply to Part 19 is if one adopts Ameritech's arguments as to why UNEs and retail service are not comparable. These arguments, however, do not persuade the Commission that Part 2 is inapplicable to Part 19. Moreover, these arguments are more relevant to a discussion of whether Ameritech's special construction practices are discriminatory. At hand is the determination of whether the situations delineated on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 should govern when CLECs must pay special construction charges for available UNE facilities. Although Ameritech may be correct and UNEs and retail service may not be comparable in every respect, the emphasis here is on the assessment of special construction charges and providing telecommunications service through a Commission approved tariff consistent with the Commission's rules, the Act, FCC rules, and federal law. The Commission would also note that the record lacks sufficient evidence demonstrating that the nine conditions listed in Ill. C. C. No. 20, Part 2, Section 5 would not arise in the context of special construction performed for CLECs in the provisioning of UNE.

Furthermore, Section 9-104 of Act supports the notion that Ameritech must have some parameters on its assessment of special construction charges on CLECs for the provisioning of UNE facilities. Given its practice of posting on TCNet its definition of "available" and under what circumstances such charges will be assessed, Ameritech has given itself free reign to determine when charges are due. Such discretion lends itself to abuse and prevents the Commission from exercising oversight to ensure that all CLECs are treated equally regardless of how Ameritech treats its retail customers.

Finally, in Docket Nos. 96-0486/0569 (Consolidated),[7] where the Commission set prices for unbundled elements, the Commission stated:

> We are also concerned that the tariff Ameritech Illinois has proposed in this proceeding makes it impossible for the Commission, new entrants and even Ameritech Illinois itself, to cogently determine how and when nonrecurring charges apply. The Commission, therefore, orders that all

[7] Docket Nos. 96-0486/0569 (Consolidated) Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic.

> tariff provisions relating to any nonrecurring charges be specific and clear as to how and when those charges apply.[8]

Hence, requiring Ameritech to modify its tariff language concerning special construction as described below is consistent with prior Commission determinations.

Accordingly, the Commission concludes that Ameritech may assess special construction charges on CLECs for the provisioning of an available facility if one or more of the nine conditions found on Original Sheet Nos. 1 and 2 of Ill. C. C. No. 20, Part 2, Section 5 are met. If a facility is not "available," a CLEC still desiring the unavailable UNE facility must follow Ameritech's BFR process. The same nine conditions will also be used to determine if one of Ameritech's retail customers must pay special construction charges. Ameritech must adopt specific policies for determining and notifying, in writing, CLECs, retail customers, and its affiliates that special construction charges are required. CLECs, retail customers, and Ameritech's affiliates must receive notice of the amount of special construction charges that will be necessary within 48 hours of their submission of an order. Ameritech shall modify its tariff to reflect this conclusion.

To the extent that the Commission's definition of "available" or determination of when special construction charges may be assessed is inconsistent with the terms of an interconnection agreement, the Commission makes no finding as to what impact its conclusions have on the terms of such interconnection agreement. Such a finding would involve the resolution of legal issues which have not been addressed in this record. Interconnection agreements that rely solely on Ameritech's tariff to determine when special construction charges apply, however, can not be said to be inconsistent with the Commission's conclusions in these matters. Notably, in situations where an interconnection agreement references "available" network elements yet does not define "available," the Commission's definition shall apply.

VI. DOUBLE RECOVERY

Among the allegations made during this investigation is that Ameritech is already recovering through the recurring rates that it charges for UNEs the costs that it seeks to recover through special construction charges. Such double recovery is not permissible. Even if one or more of the nine conditions in Ill. C. C. No. 20, Part 2, Section 5, Original Sheet Nos. 1 and 2 are satisfied, Ameritech may not assess special construction charges if the costs allegedly recovered through such charges are recovered elsewhere in Ameritech's rates. To resolve this issue it will be helpful to discuss the premise upon which Ameritech's rates are based: rates for UNEs are based on TELRIC studies while rates for retail service are based on long-run service incremental costs ("LRSIC") studies.

[8] Second Interim Order, (February 17, 1998), at p. 90.